STATE OF MICHIGAN

COURT OF APPEALS

DAVID C. GOLLMAN,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
February 24, 2011

No. 293744
Wayne Circuit Court
LC No. 08-014218-CL

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

METER, J. (*dissenting*).

Because I believe that the trial court ruled properly given the facts presented to it, I respectfully dissent. I would affirm the grant of summary disposition to defendant.

This appeal concerns the amount of back pay to which plaintiff is entitled. The trial court determined that plaintiff was not entitled to any back pay because he made more money from his interim employment than he would have made had he been continuously employed with defendant. In making its ruling, the trial court relied, in part, on *Egan v Detroit*, 150 Mich App 14; 387 NW2d 861 (1986). Plaintiff contends that *Egan* was wrongly decided and should not be followed.

MCL 35.402, a provision of the veteran's preference act (VPA), MCL 35.401 *et seq*., provides that a veteran who has been improperly discharged and later reinstated "shall be entitled to receive compensation for the time lost from [the] date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him at the date of dismissal or suspension." In *Egan*, 150 Mich App at 26, the plaintiff earned money through consulting work while he was not working with the defendant because of a wrongful dismissal. The plaintiff, relying on *Cremer v Alger County Road Comm'rs*, 325 Mich 27; 37 NW2d 699 (1949), argued that his award under the VPA should not have been reduced by the amount he earned in his consulting work. *Egan*, 150 Mich App at 26. In *Cremer*, 325 Mich at 34, the Supreme Court stated the following:

> There is no merit to defendant's further contention: "If plaintiff was wrongfully discharged, his recovery should be reduced by the amount he could earn at general labor for the defendant." The reason defendant urges in support of this contention is that it was plaintiff's "duty to mitigate the damages by taking

other employment." The answer is that the statute, which is class legislation favoring honorably discharged veterans, in part reads:

> "And provided further, That where such veteran has been reinstated to his employment upon the written order of the . . . prosecuting attorney if a county employee, . . . then such veteran shall be entitled to receive compensation for the time lost from date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him at the date of dismissal or suspension."

While it fairly appears that plaintiff declined to return to defendant's employ as a common laborer, he testified he sought employment elsewhere and stated to one to whom he was applying: "I would try anything."

In our judgment this appeal presents no ground or reason that would justify reversal.

In *Egan*, 150 Mich App at 27-28, the Court held:

> Even assuming that, pursuant to *Cremer*, a plaintiff's failure to mitigate his damages by obtaining like employment cannot be relied upon to reduce his award under the veteran's preference act, we believe this proposition does not prevent a reduction of the monetary award where plaintiff has in fact had earnings during the period of dismissal. If we were to accept plaintiff's argument, a veteran who has obtained interim employment at a higher wage during the entire dismissal period would nonetheless be entitled to full back pay for the period. We cannot believe the Legislature intended to bestow such a windfall since damages are generally designed to compensate for harm done. In the scenario suggested above, the improperly dismissed veteran has suffered no harm, at least financially, and thus, while entitled to reinstatement to his former position, he should not receive an award for back pay. Therefore, we conclude that the trial court properly reduced plaintiff's award by the amount of income earned by plaintiff during the period of his dismissal from city employment.

Plaintiff contends that *Egan* was improperly decided in light of *Cremer* and that, therefore, it should be abrogated. We cannot agree that the *Egan* Court improperly interpreted *Cremer*. The holding in *Cremer* was less than clear. The *Cremer* Court did not set forth a bright-line rule indicating that an award of back pay under the VPA should never be set off by money earned during interim employment. Instead, the *Cremer* Court indicated that the plaintiff in that case was not obligated to take a less appealing job with the defendant, and the Court appeared to emphasize that the plaintiff had been unsuccessful in finding different interim employment.

Cremer simply does not mandate a reversal of *Egan*, which remains good law under the doctrine of stare decisis. The trial court properly concluded that *Egan* required an offset for the money earned by plaintiff during his interim employment.

Plaintiff argues that the trial court improperly ruled on plaintiff's "preliminary issues" regarding the computation of damages.[1] Plaintiff argues that the court failed to consider that a

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[1] The trial court ruled as follows regarding defendant's motion for summary disposition:

> Mr. Gollman was an assistant line supervisor, so it was the [c]ourt's feeling that any other person working in that position or [a] similar position, that overtime pattern should be used to determine what overtime would be available to Mr. Gollman.
>
> Also insofar as the other benefits that Mr. Gollman was entitled to, bank time, time that would be put into his bank, that was figured in. The report instructed that that be done. And we have figures that have been submitted, what Mr. Gollman would have made compared to what he did, in fact, make while he was away.
>
> And in order to determine what amounts he would have made, that he did actually make, Internal Revenue transcripts were used for the years 2003 to 2007. For the year 2008 a W-2 was used. And once the computations were made, it turns out that Mr. Gollman made $211,474 more than he would have made if he had stayed on the job here as an assistant line supervisor.
>
> Mr. Gollman when the case was first presented to the [c]ourt indicated that and I was under the impression that he was entitled to receive a great deal of money for being off of the job, and after some discussion with the attorneys the [c]ourt decided that he would be given an advance of $30,000 against the amount that he would be paid once the computations were done. As it turns out, Mr. Gollman was not entitled to that $30,000 because he made far more than he would have made if he had stayed on the job. Even taking into consideration the cashing out of his annuity or pension plan, which was set at the amount of 125,000 or so and taking out the amount that is attributable to gambling winnings, he still would come out $52,000 more than what he would have made.
>
> So that considering all of the materials that have been submitted, there are no genuine issues of fact, no genuine issues of material fact that have to -- have been decided. The Court has considered the legitimate documents from the Internal Revenue, the W-2s and the other information that has been submitted.

large part of his purportedly earned interim income for 2003 – $164,663 – was the result of a liquidated pension and that $8,040 represented gambling winnings for that year and not earned income. Plaintiff further states:

> Similarly, in 2004 [p]laintiff reported gambling winnings of $32,140.00; in 2006 he reported non-wage income of $2,000.00; and in 2007 he reported $1,448.00 as income from unemployment compensation and an additional $1,200.00 in non-wage income.
>
> As a consequence of all of the above, over the entire period of his discharge, [p]laintiff received non-wage income totaling $209,491.00, all of which the city misrepresented to be income from interim employment.

In his responsive brief in the trial court, plaintiff stated only that an amount "in excess of $125,000.00" was attributable to the liquidation of his pension and that "[a]pproximately $34,000 of income reported by [p]laintiff to the IRS came as a result of gambling winnings . . . ." Plaintiff did not calculate the $209,491 that he cites on appeal. He made the further calculations only in a motion for reconsideration, after the trial court had made its summary-disposition ruling. Accordingly, plaintiff did not present his argument properly in the trial court. See, e.g., *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("The grant or denial of a motion for reconsideration rests within the discretion of the trial court. . . . We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.").

As noted by the trial court, the documents submitted demonstrated that plaintiff made $211,474 more during the time away from city employment than he would have made while on his standard job. Accordingly, even subtracting $159,000 ($125,000 + $34,000) would not

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> The [p]laintiff raises a number of issues regarding how the computation should be made and what other expenses should have, should be considered, really questioning the figures from the Internal Revenue, from the W-2s and the other documents that, that should, that have been used here.
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> And I just caution that MCR 2.116(G)(4) says that with a Motion for Summary Disposition under (C)(10) it's not enough for the opponent to come in and deny or question, but there is required affidavits and other documentation to specifically point out facts that would defeat the motion, and that has not been done here.
>
> Motion for Summary Disposition is granted. The $30,000 advanced to Mr. Gollman is to be paid within 30 days from this date.

I reject plaintiff's assertion that the trial court failed to adequately rule on various issues. The court, either explicitly or implicitly, did rule on the material issues.

entitle plaintiff to relief; nor, for that matter, would subtracting $209,491 entitle plaintiff to relief. Moreover, plaintiff provided no documentary support below, and did not point to a portion of the record, for his assertion that $125,000 represented the liquidation of a pension; he merely made this bald assertion in his responsive brief. The assertion about "gambling income" was arguably supported, at least in some fashion, by a 2004 tax return showing an amount of $32,140 attributable to gambling. However, plaintiff has not adequately demonstrated that gambling winnings should not be considered "income earned by plaintiff" as stated in *Egan*, 150 Mich App at 28.

Plaintiff argues that the money he earned by way of his interim employment was earned in locations away from his home and that he incurred considerable expenses to participate in the jobs. He contends that defendant's set-off amount should in turn be set off by these expenses. However, plaintiff provided no documentation in support of these expenses before the ruling on the summary-disposition motion; he merely mentioned their existence in his responsive brief and provided partial documentation by way of his motion for reconsideration. Accordingly, I find that the trial court did not err in failing to take them into consideration. *Innovative Adult Foster Care*, 285 Mich App at 475; *Charbeneau*, 158 Mich App at 733.

Plaintiff also argues that the trial court should not have compared the cumulative total of interim earnings to the cumulative total of the amount plaintiff would have earned in city employment. He contends that defendant "should only receive a set-off for wages it would have paid to [p]laintiff for the corresponding period during which [p]laintiff actually earned income from interim employment." He states that he worked sporadically during the interim period. However, plaintiff provides no authority for his legal argument. The *Egan* Court stated that "the trial court properly reduced plaintiff's award by the amount of income earned by plaintiff during the period of his dismissal from city employment." *Egan*, 150 Mich App at 28. It mentioned the "period of dismissal," and did not indicate that smaller discrete periods should be examined. I find no error requiring reversal.

Plaintiff contends that his missed overtime pay was improperly calculated because it was based on a comparison with another assistant line supervisor, Jim Nomura. Plaintiff contends on appeal, as he did below, that the comparable used should have been Dennis Stokes, who was in a job one step above plaintiff and Nomura but who, according to plaintiff, had "overtime habits" that most closely mirrored his own. (Employees could work more or less overtime, according to preference.) At a hearing on April 9, 2009, plaintiff argued that Stokes would be the proper person to use as an overtime comparable. The trial court stated, "Mr. Nomura and Mr. Gollman are in the same position, so if we're going to make comparisons we should use that."

In an affidavit attached to his brief in response to defendant's summary-disposition motion, plaintiff argued that Stokes's overtime habits more closely mirrored his own as compared to Nomura's, but this affidavit was unsigned.[2] Only when attached to the motion for

[2] The majority assumes, based on comments in the record, that this affidavit was properly submitted and signed at an earlier date. I refuse to make this unsupported assumption.

reconsideration was it signed. Given the unsigned affidavit and the fact that Nomura was in the same position as plaintiff, I find no error in the trial court's relying on Nomura as a comparable.

Plaintiff argues that the trial court failed to resolve certain other "preliminary issues." However, plaintiff's briefing of this argument is so sparse that I deem the argument abandoned. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Plaintiff lastly contends that the trial court should not have granted summary disposition to defendant because defendant's motion was not supported by proper documentation. Specifically, plaintiff takes issue with defendant's self-created charts showing "the compensation which would have been paid to [p]laintiff, had he not been discharged, and graphs which purport to compare the [p]laintiff's overtime practices with Jim Nom[u]ra." However, defendant submitted to the court actual payroll records in support of its figures and projections at another point in the proceedings. I conclude that defendant submitted adequate evidence in support of its motion for summary disposition, and plaintiff did not adequately counter the evidence.

I emphasize these precepts from *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009):

> A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. The moving party must first specifically identify the issues as to which [it] believes there is no genuine issue as to any material fact, and has the initial burden of supporting its position with affidavits, depositions, admissions, or other admissible documentary evidence[.] Once this initial burden has been met, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go *beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists*. [Internal citations and quotation marks omitted; emphasis added.]

Defendant met its "initial burden of supporting its position," and plaintiff failed to demonstrate properly that a genuine issue of material fact existed. He had ample opportunity to provide facts to counter defendant's motion but did not adequately do so. I would decline to give plaintiff a second opportunity.

I would affirm the grant of summary disposition to defendant.

/s/ Patrick M. Meter